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No. 87-416

IN THE

Supreme Court of the United States

October Term, 1987

UNITED STATES CATHOLIC CONFERENCE, et. al.,
v. *Petitioners,*

ABORTION RIGHTS MOBILIZATION, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE
AND THE RUTHERFORD INSTITUTES OF ALABAMA,
ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN,
MINNESOTA, MONTANA, OHIO, PENNSYLVANIA,
TENNESSEE, TEXAS, VIRGINIA AND WEST VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

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AMICI CURIAE, IN SUPPORT OF THE
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INTEREST OF AMICI CURIAE*

Under the circuit court's unprecedented ruling in this case, virtually any corporate entity, voter, citizen, taxpayer, or person who subjectively feels compar-

* Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 36.

atively disadvantaged by a federal agency's interpretation of a tax exemption is licensed to undertake fishing expeditions for the ideological catch of the day. The circuit court's decision, in effect, expands drastically the subpoena power of plaintiffs who should not be permitted to utilize the coercive discovery mechanisms of the federal rules of civil procedure. Witness/contemnors, rather than being afforded full review on appeal of a contempt order, have instead been disqualified from contesting such an order on grounds that the district court has "colorable," though perhaps not "actual," article III jurisdiction. The Rutherford Institute is opposed to the restriction of rights of appeal due involuntary witnesses who have been adjudged in contempt of court, fined, and threatened with further invasions of their private files by would-be plaintiffs.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrews University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Ohio, Pennsylvania, Tennessee, Texas, Virginia and West Virginia and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to first amendment freedoms. Counsel for *Amici Curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

Abortion Rights Mobilization, Inc., other "pro-choice" organizations, and individuals who are voters (hereinafter collectively, "plaintiffs"), have challenged the federal tax-exempt status of the Roman Catholic Church. These plaintiffs contend that they are comparatively disadvantaged, as voters and abortion rights activists, so long as the Roman Catholic Church retains its tax-exempt status¹ and continues to engage in the political and moral debate over abortion. Although two church entities were originally named as defendants in this action, namely the United States Catholic Conference and the National Conference of Catholic Bishops (hereinafter "petitioners"), they have been dismissed as defendants on the ground that plaintiffs have asserted no valid claim against them. See *In re United States Catholic Conference*, 824 F.2d 156, 159 (2d Cir. 1987), *pet. for reh. den.* ____ F.2d ____ (2d Cir. 1987). Two government defendants remain parties.²

This matter reached the United States Court of Appeals for the Second Circuit after the petitioners were served with (deposition) *subpoenas duces tecum* demanding over 20,000 pages of documents. Petitioners refused to comply, and the district court granted plaintiffs' motion to hold them in contempt.³ On appeal,

¹Tax-exempt status is now provided to the Church by the Internal Revenue Code, 26 U.S.C. §501(c)(3)(1982).

²The executive agencies of the United States government named as defendants are the Secretary of the Treasury and the Commissioner of Internal Revenue.

³*Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337, 338 (S.D.N.Y. 1986). Judge Carter imposed a daily fine of \$50,000, and he also ruled that the plaintiffs were entitled to attorney's fees. See *In re United States Catholic Conference*, 824 F.2d at 160. The contempt order, although final, was stayed pending an appeal to the

petitioners contended that the district court lacked jurisdiction to issue subpoenas and contempt orders because (1) the plaintiffs lacked standing to sue, (2) the district court has no subject matter jurisdiction to issue advisory opinions, and therefore (3) the district court lacked article III power to hold petitioners in contempt. The circuit court held that petitioners lacked standing to raise these issues.⁴

SUMMARY OF ARGUMENT

The concept of taxpayer standing would be radically expanded if every taxpayer could challenge the tax exemptions, credits, and deductions that Congress provides to other persons and organizations.⁵ The circuit court's unprecedented ruling departs dramatically from the mainstream law of standing. Its curious decision

United States Court of Appeals for the Second Circuit.

⁴The dissenting judge observed exactly where the majority opinion went off track when he wrote, "Since a federal court's power to issue discovery and civil contempt orders derives from and necessarily depends on its jurisdictional power to hear the underlying action before it, . . . these witnesses are entitled . . . to challenge the district court's subject matter jurisdiction. . . ." *In re United States Catholic Conference*, 824 F.2d at 167.

⁵In *Abortion Rights Mobilization, Inc. v. Baker* 110 F.R.D.337, 338 (S.D.N.Y. 1986), and *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985) the district court held that *Allen v. Wright*, 468 U.S. 737 (1984) (denying standing to plaintiffs who sued Commissioner of Internal Revenue) does not bar plaintiffs' standing to sue the Commissioner in the instant case. The district court distinguished *Allen v. Wright* from the instant case, and placed great weight, *Regan*, 603 F. Supp. at 971, on *Coit v. Green*, 404 U.S. 997 (1971), summarily aff'g *Green v. Connolly*, 330 F. Supp. 1150 (D.C. 1971), even though the *Coit* plaintiffs were no longer adverse parties with any government defendants when the case reached the Supreme Court, and even though this Court has explained that *Coit* "has little weight as a precedent on the law of standing." *Allen*, 468 U.S. at 764.

reverts back to the rigid "legal rights" test in order to deny petitioners standing in the circuit court. On the other hand, its decision tears down all standing barriers that disqualify plaintiffs with generalized grievances. The circuit court's decision, which goes from one extreme to the other, completely ignores pertinent cases, like *Allen v. Wright*, 468 U.S. 737 (1984) and *Simon v. Eastern Ky. Welfare Rts. Org.* 426 U.S. 26 (1976) (neither case was cited in its majority opinion),⁶ and it erroneously relies on a dated case barely relevant: namely, *Blair v. United States*, 250 U.S. 273 (1919). The circuit court compounds its error by completely misapprehending the holding and reasoning of *Blair*.

Of course, the circuit court *did not* hold that the district court actually has subject matter jurisdiction in this case. How could it? To do so would threaten the very underpinnings of the separation of powers doctrine. Nevertheless, its ruling invites every resentful Tom, Dick, and Mary with generalized grievances to embark on indefinite and extensive fishing expeditions under cover of the discovery rules. The lower court's open-ended invitation reads as follows: "if . . . colorable jurisdiction exists, a [witness/ contemnor] may not challenge plaintiffs' standing in the underlying action or raise other issues that might demonstrate that the District Court has erroneously exercised subject matter jurisdiction over that action." *In re United States Catholic Conference*, 824 F.2d at 165.⁷

⁶Instead of discussing plaintiffs' standing, which was the gravamen of petitioner's appeal, the circuit court perversely held that the petitioners themselves lacked "standing to assert such a claim on appeal from an adjudication of contempt." *In re United States Catholic Conference*, 824 F.2d at 162.

⁷Judge Kearse concurred speculating that, to some extent, the discovery sought might disclose "information pertinent to the issue

In short, according to the circuit court, most ideologically motivated plaintiffs, who may fall well short of article III standing requirements, are free to enlist to their advantage, and with impunity, the coercive processes of a trial court, even though it may lack actual subject matter jurisdiction. The bizarre other side of this coin is that most witnesses held improperly in contempt, are denied meaningful appellate review and relief. This kind of judicial double-standard not only allocates judicial resources improperly, and distorts the efficient administration of the judicial process, it is also alien to fundamental fairness. It disqualifies persons from appealing orders issued by district court judges who are left free to exercise uncontrolled and unreviewable discretion to punish witnesses who *justifiably* challenge the court's dubious assertion of article III jurisdiction. This is truly an intolerable distortion of justice.

of plaintiffs' standing " *In re United States Catholic Conference*, 824 F. 2d at 166-167. Plaintiffs, however, never alleged nor established how the documents in possession of petitioners were relevant to their standing to sue the government defendants, and Judge Kearse did not identify which of plaintiffs' factual allegations (which are presumed to be true) needed to be corroborated by the subpoenaed documents. *Id.*

I.

The Circuit Court Should Have Exercised Its Plenary Appellate Powers To Decide Whether The Petitioners May Be Held In Contempt For Duly Resisting Subpoenas Issued In A Matter That Was Not, Under Applicable Precedents, A Case Or Controversy Within The District Court's Article III Jurisdiction.

A. *BLAIR V. UNITED STATES* DOES NOT SUPPORT THE PROPOSITION THAT A WITNESS LACKS CAPACITY TO CHALLENGE THE DISTRICT COURT'S JUDICIAL POWER IN AN APPEAL THAT SQUARELY PRESENTS PURE QUESTIONS OF LAW CONCERNING THE COURT'S ARTICLE III JURISDICTION.

The district court's orders holding the petitioners in contempt were immediately appealable and, without delay, the circuit court should have exercised its appellate powers to provide witnesses,⁸ who are unconstitu-

⁸As the circuit court majority opinion states, "In this respect a witness has appellate rights superior to those of a party." *In re United States Catholic Conference* 824 F.2d at 160 (Newman, J., majority opinion). See also *In re Manufacturers Trading Corp.*, 194 F.2d 948 (6th Cir. 1952); *Fenton v. Walling*, 139 F.2d 608 (9th Cir.1944), *cert. denied*, 321 U.S. 798 (1944); see generally 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3917 at 616, 622-23, 626-27 (1976), 9 Moore's *Federal Practice* ¶110.13[4] at 167 (1986 & Supp. 1986-87). "[A]llowing these witnesses to obtain immediate appellate review does not subvert the final judgment rule since any claims they have must be asserted . . . on appeal from their contempt sanction—or be forever lost." *In re United States Catholic Conference*, 824 F.2d at 170 (Cardamone, J., dissenting). Hence, the district court's order holding petitioners in contempt was appealable, as the circuit court recognized when it stated, "A witness adjudicated in civil contempt for failure to comply with discovery orders unquestionably has a right to appeal from the contempt order, notwithstanding the lack of a final judgment in the underlying lawsuit in which discovery was sought." *In re United States Catholic Conference*, 824 F.2d at 160. Non-party witnesses, like petitioners, have a right to appeal a contempt order

tionally held in contempt, with full and meaningful judicial review and appropriate relief. Although the circuit court recognized the appellate rights of witnesses held in contempt, its decision severely limits the scope of a contemnor's appeal whenever district court jurisdiction is "colorable." In such "colorable" situations, contemnors in petitioners' shoes, who challenge the lower court's "actual" subject matter jurisdiction, supposedly lack standing to obtain immediate and complete judicial review and relief, even when urgent relief from civil contempt orders issued by lower courts without article III jurisdiction is needed and deserved.⁹ This new bifurcated standard is not justified on the basis of sound

without waiting for final judgment to be entered in the civil action that gave rise to the allegedly contumacious conduct. See e.g., *United States v. Ryan*, 402 U.S. 530, 532 (1971), *Cobbledick v. United States*, 309 U.S. 323, 326-27 (1940) (citing *Alexander v. United States*, 201 U.S. 117, 121-22 (1906)). If a witness is held in contempt, his "situation becomes so severed from the main proceeding as to permit an appeal." *Cobbledick v. United States*, 309 U.S. at 328.

⁹The Supreme Court has held that when a federal court acts in excess of its jurisdiction, an order punishing a person for contempt is void. *Ex parte Rowland*, 104 U.S. (14 Otto) 604, 612, 26 L. Ed. 861 (1881). See also *In re Burrus*, 136 U.S. 586, 597 (1890), *In re Sawyer*, 124 U.S. 200, 221-22 (1888), *Ex parte Fisk*, 113 U.S. 713, 726 (1885). Judge Posner writes, "You cannot (with exceptions not pertinent here) get discovery in the federal courts unless you have a pending lawsuit, and . . . if the order is invalid the contempt judgment must be set aside." *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1158 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985). "Thus, under *Marrese*, . . . [i]f it is determined that the lawsuit should not have been pending because the district court lacked subject matter jurisdiction, then the discovery order falls . . . [a]nd . . . the contempt judgment for its disobedience must *a fortiori* be vacated. *In re United States Catholic Conference*, 824 F.2d at 169 (Cardamone, J., dissenting).

policy considerations; nor does the novel distinction between "actual"—as opposed to "colorable" jurisdiction—effectively conserve important and limited judicial resources.

A needless and unwise technicality has been injected into the law by the circuit court's order that, in effect, causes irreparable harm to the government defendants and to petitioners held in contempt. Moreover, when the circuit court accepts an appeal, as it must, to determine whether there is "colorable" jurisdiction, it makes no sense to withhold normally exercised appellate power to determine squarely presented challenges to the district court's "actual" subject matter jurisdiction. No research is wasted in deciding the latter question but not the former. Had the circuit court properly reached the question of "actual" subject matter jurisdiction, it could have saved precious time, not to mention the energy and judicial resources, that will now be wasted by the parties in discovery in the lower courts. The situation is further muddled embarrassingly by the circuit court's odd citation of *Blair v. United States*, 250 U.S. 273 (1919), in support of its holding.

The circuit court completely misunderstood the rationale underlying *Blair*, and therefore this dated and inapposite precedent was applied in a counterproductive and anomalous way. *Blair* involved appeals from orders adjudging witnesses "guilty of contempt of court because [they refused] to obey an order directing them to answer certain questions asked of them before a federal grand jury" *Id.* at 276. The principal question urged upon the Supreme Court was whether "the Act of June 25, 1910, c. 392, 36 Stat. 822, and its amendments . . . are unconstitutional" *id.* at 278, but the Court held that it was unnecessary to decide whether or not the statute was constitutional—because the grand jury had

identified neither the "precise nature of the offense, if there be one" nor "the identity of the offender." *Id.* at 282. Therefore, the Court held that "witnesses are not entitled to take [premature] exception to the jurisdiction of the grand jury or the court over the particular-subject matter that is under investigation." *Id.* (emphasis added).¹⁰

The holding in *Blair* makes sense because, as the Supreme Court held, the grand jury has "authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." *Id.* at 283. Moreover, since the broad investigatory power and subject matter jurisdiction of the grand jury did not depend upon the constitutionality of a particular statute challenged by Blair, a premature resolution of a particular question of constitutional law could not give Blair the relief he sought. In this case, however, the pertinent facts underlying the cause of action and the question of subject matter jurisdiction are known. Moreover, as Judge Cardamone observed precisely in dissent:

. . . *Blair* represents an ordinary application of the standing doctrine, inapplicable in this case. Here, unlike *Blair*, the jurisdiction of the court to issue a contempt order is derivative of its

¹⁰ It would have been a departure from sound practice if *Blair* held that a federal statute was unconstitutional—before any identifiable person was charged with violating it. Under such contingent circumstances, a witness would not be deemed sufficiently "interested to challenge the jurisdiction of court or grand jury over the subject-matter that [was] under inquiry." *Blair v. United States*, 250 U.S. at 279. In the instant case, by contrast, the government defendants have already been charged by plaintiffs with various and sundry derelictions of law enforcement and abuses of prosecutorial discretion.

jurisdiction over the underlying action. Thus, unlike a grand jury witness these court-ordered witnesses do have an interest in the district court's proper exercise of its authority.¹¹

Notwithstanding the obvious difference in the posture of this case from *Blair*, the circuit court nevertheless found *Blair* to be "[t]he most pertinent authority," *id.*, at 160, primarily relying *id.*, at 162, on *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). *Blair*, of course, was properly cited in *Valley Forge* because, as in *Ashwander v. TVA*, 297 U.S. 288 (1936), the Constitution's Property Clause (Art. IV, § 3) was allegedly violated by federal executive agencies implementing statutes enacted by Congress. *Ashwander v. TVA*, 297 U.S. at 330-40. Given the Property Clause issues presented by these cases, Chief Justice Rehnquist appropriately cited the very first case Justice Cardozo cited in his famous *Ashwander* concurrence: *Blair*. See *Ashwander*, 297 U.S. at 341.

To avoid unnecessary confrontations with "the other two coequal branches of the Federal Government," Justice Rehnquist wrote, ". . . this Court has " 'refrain[ed] from passing upon the constitutionality of an act [of the representative branches] unless obliged to do so . . . ' " *Valley Forge Christian College*, 454 U.S. at 474 (citing *Blair*). The irony for the present case is obvious; the article III jurisdictional question ducked by the circuit court enables the district court to pass upon, gratuitously, several delicate issues of constitutional

¹¹ *In re United States Catholic Conference*, 824 F.2d at 173 (Cardamone, J., dissenting).

law.¹² It was just such a gratuitous resolution that the *Blair* Court avoided. Thus, the circuit court completely misunderstood the reason for and Property Clause context of the *Blair* citation in *Valley Forge*.

In sum, the facts in the *Blair* appeal did not present the jurisdictional question whether there was a case or controversy; *per contra*, petitioners' appeal to the circuit court did. It follows that petitioners *qua* contemnors had standing to obtain relief that would have provided them with meaningful redress from unauthorized district court proceedings had the circuit court decided, without wasteful delay, the squarely presented article III question.

B. THE CIRCUIT COURT'S CURIOUS EXPANSION OF THE DOCTRINE OF "COLORABLE" JURISDICTION IS DRACONIAN IN PRACTICE, AND THEREFORE THE ALTERNATE FORMULATION FOUND IN *ABBOTT LABORATORIES V. GARDNER* IS A FAR MORE APPROPRIATE STANDARD FOR BALANCING THE COMPETING FACTORS IN THE REVIEW OF CONTEMPT ORDERS DULY APPEALED BEFORE FINAL JUDGMENT.

The circuit court held that a witness, who is not asserting an evidentiary privilege, may *not* challenge a district court's subject matter jurisdiction in his appeal of a contempt order—if the lower court has "colorable" jurisdiction. This is bad law. The circuit court's doctrine of colorable jurisdiction is perhaps appropriate and applicable when, as in *United States v. United Mine*

¹²If the circuit court in this case had decided, or at least discussed, the question of subject matter jurisdiction, it might avoid the need to determine ultimately whether a federal statute: namely, 26 U.S.C. §501(c)(3), as applied, "violates the First Amendment of the United States Constitution." *Abortion Rights Mobilization, Inc. v. Baker* 110 F.R.D. at 338.

Workers, 330 U.S. 258 (1947) (but unlike this case),¹³ an appellant affirmatively defies a court order long before he files an appeal. In such cases, the contemnor "who defies the public authority and willfully refuses his obedience, does so at his peril." *Id.* at 303; *see also Maness v. Meyers*, 419 U.S. 449, 458-59 (1975).

The petitioners, in this case, sought *pre-compliance* review of the contempt order rather than acting at their peril. Pre-compliance review, in many cases, serves the ends of justice. For example, in *Maness v. Meyers*, *id.*, a lawyer who was not a party to the underlying suit (involving his client), was permitted to appeal a contempt order issued immediately after he advised his client not to provide evidence that was arguably within the client's fifth amendment privilege. The Supreme Court recognized that the lawyer should have the opportunity of obtaining pre-compliance review because "appellate courts cannot always 'unring the bell' once the information is released." *Maness*, 419 U.S. at 460. The *Maness* Court recognized that later attempts to secure relief from unconstitutional judicial inquiries provide "no assurance whatever" that "the cat," once out of the

¹³"[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed . . . until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) (emphasis added). The *United Mine Workers* Court held, that the duty of obedience obtains where, as here, "the subject matter of the suit . . . was properly before the court; where the elements of federal jurisdiction were clearly shown" *Id.* at 294 (emphasis added). However, when on appeal, it turns out that a district court order "was beyond the jurisdiction of the court", the contemnor is entitled to remedial relief. *Id.* at 295.

Although the petitioners in this case duly filed an appeal, the circuit court refused to ascertain, contrary to *United Mine Workers*, whether the contempt order was "issued by courts possessed of jurisdiction of persons and subject matter." *Id.* at 303.

bag, can be put back. *Id.* at 463. It provided the lawyer not only with pre-compliance review, but with a *remedy* that fully protected him from the consequences of an improperly issued contempt order. The circuit court, however, in this case, expects petitioners simply to "abide by any orders of the district court once the stay is terminated." *In re United States Catholic Conference*, 824 F.2d at 163.

This expectation springs an unfair and vicious trap. Unless petitioners are held in contempt, they cannot appeal, but their appeals were a sham since, without affording full and immediate review, the circuit court ominously advised petitioners to let the cat out of the bag, or suffer further consequences. Once out, the cat is forever loose in the hands of ideological adversaries.

Appellate review becomes toothless when courts of appeal, in effect, inform witness/contemnors (and more significantly, their adversaries), that there is no prospect of any truly remedial appellate action. Surely the law cannot, and should not leave involuntary witnesses so unprotected and vulnerable to abuse of process.

The tried and true formula articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), is eminently suitable for balancing the competing factors in this case. Instead of denying standing to all witnesses held in contempt whenever a plaintiff, who stands to profit by the enforcement of the discovery order, manages to file artfully drawn pleadings that pass the evanescent test of "colorable" jurisdiction, this Court should apply the *Abbott Laboratories* test of reviewability. Then, the ripeness of a contemnors' appeal would turn on "the fitness of the issues" for judicial review and "the hardship to the parties of withholding [pre-compliance] court consideration" of the district court's subject matter

jurisdiction. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. at 149.

In the instant case, the pleadings and the record filed in the circuit court clearly are sufficient for a determination of the case or controversy question presented by petitioners' appeals. Moreover, the postponement of immediate and full consideration of their appeals presents a severe hardship to them, as well as to the government defendants. On the other hand, as in *Abbott Laboratories*, immediate and meaningful consideration of petitioners' appeals presents no hardship to the circuit court, and even the plaintiffs are benefitted if they learn, before trial, that they do not qualify as Article III parties.

No doubt, under these circumstances, this Court's formulation of a workable standard in *Abbott Laboratories* is far more suitable than the meaningless ritual that perfunctorily makes sacrificial lambs of witnesses who are, in effect, required to subject themselves to contempt citations in order to perfect remedially barren appeals. In sum, the circuit court's half-baked and unworkable notion of "colorable jurisdiction" amounts to a charade that is bad law.

II.

The Hardship To Petitioners Of Substantial Fines And Attorneys Fees, And Immediate Jeopardy Of A Criminal Contempt Order Is More Than Sufficient To Justify Their Standing To Appeal The Civil Contempt Orders In This Case

The money damages, which have been assessed by the district court, are palpable, concrete, and substantial economic losses. The fines (\$50,000 per day) could not have been imposed on petitioners, *but for* the discovery enforcement and civil contempt orders that were issued erroneously by the district court that lacked, at least in petitioners' view of the case, actual subject matter jurisdiction. The petitioners and plaintiffs are clearly in

adversarial positions. The petitioners' personal stake in the controversies over the original discovery order, the contempt order, the fines, and the district court order requiring petitioners to pay plaintiffs' attorneys fees assures "'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The petitioners would have had meaningful review of their challenge to the contempt order if the appellate court had proceeded to full consideration of the district court's article III jurisdiction. The circuit court's surprising (and it is not too much to add *outrageous*) refusal to reach this question on grounds of petitioners' standing was based on the novel, unprecedented, and indeed, dangerous notion that the district court had "colorable" subject matter jurisdiction, and that petitioners needed some personal interest—over and above their personal interest in keeping confidential 20,000 documents (privacy rights), their personal interest in avoiding the stigma of a contempt order, their fifth amendment rights of due process of law, their religious interests (protected by the free exercise and establishment clauses of the first amendment), their personal interest in avoiding the obligation to pay a fine (of \$50,000 per day), their personal interest in avoiding the payment of attorneys fees of plaintiffs who resent their tax exempt status, and their personal interest in dismissing a suit that threatens to place them in criminal contempt, and which, if successful, will terminate their constitutionally guaranteed tax-exempt status, merely because they seek to exercise first amendment rights including freedom of speech.

In short, petitioners have been subjected to several severe, costly and coercive orders, and are in imminent

danger of being held in criminal contempt. It is impossible to imagine a more direct, relevant, and constitutionally significant personal interest.

The foregoing factual predicate meets the core constitutional component of the Supreme Court's standing doctrine, as set forth in *Allen v. Wright*:

The injury alleged must be, for example, 'distinct and palpable,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin* . . . [422 U.S.] at 501, and not "abstract" or "conjectural" or "hypothetical," *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. See *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S., at 38, 41.

468 U.S. 737, 751 (1984). See also *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 471-474 (1982).

The circuit court concedes that "witnesses have standing to question . . . whether the District Court has a colorable basis for exercising subject matter jurisdiction, but if colorable jurisdiction exists—[petitioners may only challenge] "discovery orders that implicate [their] personal rights" *In re United States Catholic Conference*, 824 F.2d at 158. This holding flies in the face of the Supreme Court's repeated admonition that, when article III questions are presented, the "'fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than on the issues he wishes to have adjudicated.'" *United States v. Richardson*, 418 U.S.

166, 174 (1974) (emphasis in original) (quoting *Flast v. Cohen*, 392 U.S. at 99).

The circuit court's approach revitalizes the long discarded legal rights requirement. In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Supreme Court specifically rejected the "legal interest" or "legal right" approach as tests that go to the merits of the controversy, rather than bearing on the standing issue. *Id.* at 153. To the extent that the circuit court is basing its holding *sub silentio* on prudential considerations, they do not apply; first, because petitioners are not asserting the rights of third parties, not before the court, and second because no "other governmental institutions may be more competent [than the federal courts] to address the questions" presented by petitioners' appeal from the district court's contempt order. Compare *Warth v. Seldin* 422 U.S. 490, 500 (1975). Since the *jus tertii* and prudential separation of powers concerns are inapplicable, petitioners' appeal presents a straightforward article III challenge that could be decided as a question of law, without further discovery.

If petitioners comply with the order to pay plaintiffs the coercive fines assessed, as the circuit court believes they will, *In re United States Catholic Conference*, 824 F.2d at 163, and if they decline the imminent threat of being held in criminal contempt and turn over the documents (before the government defendants' have another opportunity to raise the question of subject matter jurisdiction), the irreparable harm they suffer cannot be undone, even if the government defendants eventually prevail. If petitioners do not pay their fines and refuse to turn over the documents, and are held in criminal contempt, the ensuing loss of good will, so precious and indispensable to the bona fides of any religious body,

constitutes irreparable harm, and the Supreme Court has in the past held that forcing such a Hobson's Choice on litigants is unjust. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (excellent discussion of the doctrine of ripeness indicating that the question turns on the "fitness of the issues for judicial decision" and the hardship on the parties of withholding court consideration"). In the instant case, the issue of subject matter jurisdiction is fit to decide, and the unprecedented hardship on the petitioners should not be tolerated by this Court.

The circuit court's niggardly exercise of its appellate powers in this case is inexcusable, given this Court's recent and unequivocal mandate in *Bender v. WilliamSPORT Area School Dist.*:

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See *e.g.*, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-180, 2 L. Ed. 60 (1803). For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244 . . . (1934). See *Juidice v. Vail*, 430 U.S. 327, 331-332 . . . (1977) (standing). "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of

the lower court in entertaining the suit.” *United States v. Corrick*, 298 U.S. 435, 440 . . . (1936) (footnotes omitted).

U.S. , 106 S. Ct. 1326, 1331 (1986). The *Bender* principle (i.e., *sua sponte* duty of appellate courts to decide Article III questions of law) obtains no less when the power of a federal court to issue a *subpoena duces tecum* depends on its subject matter jurisdiction under the Judiciary Article of the Constitution. The principle was succinctly and ably stated by Justice Jackson in *United States v. Morton Salt Co.*:

Federal judicial power . . . extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends. The judicial subpoena power not only is subject to specific constitutional limitations . . . but also is subject to those limitation inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.

338 U.S. 632, 641-42 (1950). Whatever prudential considerations motivated the circuit court when it denied petitioners’ standing (and they were not clearly identified), they cannot override a federal appellate court’s duty to vacate duly appealed orders that are wrongfully issued by district courts lacking power under Article III of the Constitution of the United States.

III.

The Court Of Appeals Erred In Failing To Determine That Plaintiffs’ Civil Action Was Not An Article III Case or Controversy, Even Under Its Colorable Jurisdiction Standard, Because Plaintiffs’ Pleadings Demonstrate Clearly An Utter Lack Of Standing To Sue The Government Defendants.

Although the circuit court held that the district court’s “colorable” jurisdiction is based on plaintiffs’ claim of a “direct, personal injury arising from the fact that the federal defendants’ fail[ed] to enforce the political action limitations of section 501(c)(3),” the only injury it identified is the plaintiffs’ “competitive disadvantage with the Catholic Church in the area of public advocacy on important public issues.” *In re United States Catholic Conference* 824 F.2d at 165-66. No specific economic disadvantage or present objective harm was determined to exist by the circuit court (or the district court).

Whenever an organization is suing on its own behalf, the key question is whether it has alleged “a concrete and demonstrable injury to [its] activities . . .” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Although “[a] wide variety of injuries have been recognized in this context,” L. Tribe, *American Constitutional Law* 145 (2d ed. 1988), in line with the Supreme Court’s unbending policy against assertion of generalized grievances, an organizational litigant is always required to allege “more than simply a setback to [its] abstract social interests . . .” *Havens Realty Corp. v. Coleman*, 455 U.S. at 379 (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). A competitive disadvantage does not necessarily impair perceptibly the plaintiffs’ abilities to engage in pro-choice or pro-abortion activities, such as counselling, referrals, lobbying, and demonstrating. Indeed, no perceptible specific problem has

been identified contrary to the requirements of *Laird v. Tatum*, 408 U.S. 1 (1972), and countless other Article III cases.

The circuit court cited, as support for plaintiffs' "colorable" standing, two so-called "zone of interests" cases involving substantial economic injuries suffered by competitors of business entities who were wrongfully permitted to engage in economic activity contrary to federal statutes. In both of these cases, *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Clarke v. Securities Industry Ass'n.*, 107 S. Ct. 750 (1987), plaintiffs claimed standing under the Administrative Procedure Act, 5 U.S.C. 702, which authorizes judicial review at the instance of any person who has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." However, "[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." *Valley Forge Christian College*, 454 U.S. at 487-88, n.24; see e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. at 501); see also *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Moreover, it was clear that the competition permitted by federal agencies in *Data Processing* and *Clarke* caused dollars-and-cents injuries. New competitors were allegedly authorized to enter the market, contrary to Congress' prohibition. Thus, the only issue was whether this economic injury was "arguably within the zone of interests to be protected or regulated by the statute . . ." *Clarke*, 107 S. Ct. at 756. The zone of interest test, in the instant case, does not come into play because the plaintiffs have not plausibly averred, with due specificity, that they have been injured in some concrete way by the competitive

disadvantage. Moreover, plaintiffs have not shown how any objectively ascertainable competitive disadvantage which affects them personally can be eliminated by the declaratory or injunctive relief sought in the district court.

Plaintiffs do allege that the Internal Revenue Service has failed to carry out their legal obligations concerning church entities, but "[s]uch suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication." *Allen v. Wright*, 468 U.S. at 759-760 (1984). The proper procedure requires the circuit court to compare "the allegations of the particular complaint to those made in prior standing cases" involving the Internal Revenue Service. *Allen v. Wright*, *supra*, 468 U.S. at 751-752. See also *Los Angeles v. Lyons*, 461 U.S. 95, 102-105 (1983). In every case, the harm allegedly sustained by a private plaintiff who sued the Internal Revenue Service (but who was not seeking tax relief), the Supreme Court has held that plaintiffs' injuries, economic or otherwise, are too indirect, attenuated, and abstract in view of the speculative prospect of obtaining relief from the injury (as a result of a favorable ruling). E.g., *Allen v. Wright*, *supra*; *Simon v. Eastern Kentucky Welfare Rights Org.*, *supra*. "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." *Allen v. Wright*, 468 U.S. at 766 (quoting *Simon*, 426 U.S. at 39).

These cases "suggest 'that litigation concerning tax liability is a matter between the taxpayer and IRS, with the door barely ajar for third party challenges.'" *Allen v. Wright*, 468 U.S. at 748-749. The door is *never* ajar when the private plaintiffs "claim no injury dependent on taxpayers's actions" *Id.* at 749, or when it is entirely

speculative whether the injunctive relief sought by plaintiffs will decrease the constitutionally protected efforts of the Roman Catholic Church in the marketplace of ideas. It is also entirely speculative to what extent the tax exemption enjoyed by plaintiffs directly thwarts any concrete religious or political action program that is not only conceivable, but which plaintiffs actually planned.

If the competitive disadvantages allegedly caused by IRS inaction, or by its refusals to revoke tax exemptions satisfy article III case or controversy requirements, it is hard to imagine a situation where a person or corporate entity, without an equalizing exemption, will lack standing to sue federal agencies that permit exemptions. A rule of standing based on competitive disadvantage, as suggested by the lower courts, invites *every* person or entity in the nation to challenge statutory exemptions that, abstractly considered, cause some generalized comparative disadvantages. "Abstract injury is not enough. The plaintiff must show that 'he has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' " not 'conjectural' or 'hypothetical.' " *Los Angeles v. Lyons*, 461 U.S. at 101-102. Plaintiffs have not identified any specific project or ministry that they cannot undertake effectively because of their alleged competitive disadvantage. *Cf. Warth v. Seldin*, 422 U.S. at 516. "Indeed, there is no indication that [plaintiffs] have been delayed or thwarted [concerning any] project currently proposed" *Id.*

If an agency's *expenditure of federal funds* cannot be challenged by would-be plaintiffs because the article III requirements reiterated in *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982) do not confer "colorable"

standing, *a fortiori*, an agency's interpretation of an exemption that does not increase plaintiffs' taxes, but merely provides tax relief to organizations deemed worthy by Congress and federal agencies, cannot be challenged by similarly situated, would-be plaintiffs. Tax exemptions authorized for religious groups avoid excessive entanglement between government and religious groups who use property for religious, educational or charitable purposes. *Walz v. Tax Commissioner*, 397 U.S. 664 (1970). Such tax exemptions foster not only the traditionally protected activities of church entities, but also the free exercise of all religious beliefs including the propagation of beliefs about sin (for example, the Catholic religion's absolute strictures against abortion and its educational efforts to convert others to the Church's position).

To hold that non-exempt organizations have article III standing because of some unspecified theory about competitive disadvantages in the voting booth, or in the marketplace of ideas is, in effect, to junk "[t]he idea of separation of powers that underlies standing doctrine" *Allen v. Wright*, 468 U.S. at 759. Such a fundamental abandonment of core constitutional standing barriers is incompatible with *Valley Forge Christian College*, 454 U.S. at 481-83, and *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

The allegation that the tax exemption of the Roman Catholic Church somehow "diminished plaintiffs right to vote" *In re United States Catholic Conference*, 824 F2d at 159 is rather ingenious, if not disingenuous. "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." " *Warth v. Seldin*, 422 U.S., at 509 (quoting *United States v. SCRAP*, 412 U.S. 669, 688 (1973)). Nothing in this case affects anyone's right to vote or run for office.

Whatever line drawing is required by 26 U.S.C. §501(c)(3), the discretionary decisions and policies of the government defendants are unreviewable at the behest of plaintiffs who cannot identify how their effectiveness as voters has been thwarted directly by tax exemptions administered by federal executive agencies.

The plaintiffs lack even "colorable" standing (assuming but not advocating that this preposterous concept is suitable). The law, of course, is quite clear, that there is no doctrine of *arguable standing*. Professor Tribe correctly restates the hornbook law:

The upshot of *Linda R.S. v. Richard D.* 410 U.S. 614 (1973)] and *O'Shea v. Littleton*, 414 U.S. 488 (1974)] is that the interest in the just administration of the laws, including the interest in nondiscriminatory . . . enforcement, is presumptively deemed nonjusticiable even if invoked by persons with something beyond a generalized bystander's concern; only if the litigant is immediately affected as a target of enforcement can that presumption be overcome.

L. Tribe, *American Constitutional Law* 124 (2d ed. 1988). Cf. *Leeke v. Timmerman*, 454 U.S. 83 (1981). To fail to reverse the Court of Appeals for the Second Circuit, or to even imply that its ersatz "colorable" jurisdiction notion might be a judicially manageable standard, would make the law of standing, already somewhat jumbled, completely unstable.

"Carried to its logical end, ['respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is

not the role of the judiciary, absent actual present, or immediately threatened injury resulting from unlawful government action."

Laird v. Tatum, 408 U.S., at 15.

Allen v. Wright, 468 U.S. at 760. In sum, plaintiffs' "personal and professional interests" are not sufficiently specific and concrete to confer standing, be it colorable or otherwise. *Diamond v. Charles*, 106 S.Ct. 1697 (1986). Although [plaintiffs'] allegations may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the . . . Law as written be obeyed. Article III requires more than a desire to vindicate value interests." *Diamond v. Charles* 106 S. Ct. at 1705-06.

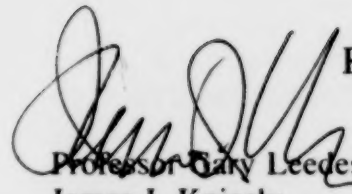
CONCLUSION

The district court's contempt judgment was immediately appealable, and petitioners do not, and should not, lack standing to appeal. Article III, of course, requires a case or controversy. Petitioners here find themselves cited for contempt as a consequence of their reliance on this fundamental requirement, and yet find themselves unable to obtain the complete and immediate appellate review of unauthorized judicial power.

Petitioners are entitled to a ruling that provides them with full remedial relief, since the plaintiffs have literally, with the indispensable assistance of the district court, forced them into contempt. The shame is that the plaintiffs have utterly failed to allege tangible or specific injuries. They appear to be motivated solely (in their suit against government defendants) by purely ideological reasons. Law enforcement for the sake of law enforcement is an interest that *all* voters, persons, and organizations share, but it is not actionable.

This Court often *prudently* requires plaintiffs to show *more* than the minimum essentials of article III standing; the circuit court *imprudently* permitted the plaintiffs, in this case, to show *less*. Therefore, this Court should direct the Court of Appeals for the Second Circuit to vacate the district court's civil contempt order and its award of attorneys fees, and dismiss the action—for lack of a case or controversy within the Judicial Power, as set forth in article III of the Constitution.

Respectfully submitted,


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